

The Role of Egypt's Supreme Constitutional Court An Overview of the New Jurisdictional Scope

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On Monday, 28 June 2021, in its 52nd session, the Egyptian House of Representative approved the passed bill amending some of the provisions of the Supreme Constitutional Court's Law No. 48 of 1979 (the "**SCC Law**")^[1]. The amendments proposed and approved, albeit brief, captured the attention of both the legal and investment arenas, given that these amendments directly relate to and affect Egypt's commitments under international treaties.

The debate was mainly focused on the effects of these amendments on investment climate and the appetite of investors to consider Egypt as one their preferred investment destinations.

The following points shed the light on the newly introduced amendments and their implications on investment climate.

The Approved Amendments

Two new articles were added to the SCC Law; Article 27(bis) and Article 33(bis).

Article 27(bis) states that "The Supreme Constitutional Court (the "**SCC**") shall have the jurisdiction to oversee the constitutionality of the decisions issued by international institutions and organizations and foreign court verdicts issued against the state"^[2].

Article 33(bis) authorizes the Prime Minister to refer the decisions referred to in Article 27(bis) to the SCC requesting that the latter rules on the constitutionality of them or the obligations resulting therefrom.

It stems from these amendments that the SCC's powers will be broadened to reviewing the constitutionality of any decrees, orders, decisions, issued by "international institutions and organizations" against Egypt. Since the presentation of these amendments to the parliament and even before they were promulgated officially, debates have been raised on the scope of applicability of such articles, especially whether or not it will include foreign arbitral awards.

In fact, according to the bulletin issued by the House of Representatives, the originally proposed wording of the bill explicitly included arbitral awards, however, a request was submitted to exclude the said wording^[3]. The final wording adopted has excluded the reference to arbitral awards.

Based on the government proposal, the rationale behind those amendments lies in national security. The main purpose of the said amendments in the first place is to tackle the constitutional loophole in the SCC Law, and ensure that no foreign decision, decree or court judgment is enforced against the state in violation of any of its constitutional provisions, and that may pose threat to its national security.

The Aftermath to the Investment Climate

The repercussions of the amendments can be foreseen from several angles; one that we are particularly concerned about is how these amendments would affect the investment climate in Egypt, and Egypt's score as an investment-friendly country.

In considering investment in potential jurisdictions, investors often study various sides of each jurisdiction to ensure that, not only would this jurisdiction facilitate and flourish the investor's business, but that it would also protect it through an effective mechanisms of dispute settlement and enforcement. A pillar to such protection is having a local judicial system that respects the provisions of the applicable international treaties and agreements to which the country is a member and to abide by decisions of international organizations. Hence, Egypt as an investment destination may be affected due to the likelihood of overruling international judgments in investment disputes for grounds of unconstitutionality in Egypt.

It may be argued, however, that the scope of application of the new amendments is restricted to a certain extent which minimizes concerned negative effects. One of the restrictions is that the new provisions only apply to decisions and foreign court verdicts directed against the Egyptian state. The other one is that constitutionality review shall be limited to decisions and foreign court verdicts referred to the constitutional court by the Prime Minister. Still, implementation of such provisions is yet to be tested.

The approach adopted by Egypt is no exception to many other jurisdictions that have numerous international decisions or foreign court verdicts issued against them. In the OECD's 6th Annual Conference on Investment Treaties held on March 2021, the point regarding the approach taken in international treaties which may have overlooked or undermined the weight of internal laws of contracting states was raised whereby it was stated that:

"The evidence of preferences in current ISDS^[4] is strong. It includes for example extensive ISDS claimant use of provisions not requiring discrimination findings and frequent use in awards; express arbitral decisions stating that investment treaties provide preferential rights over those of investors in advanced economies; different outcomes in national court and ISDS cases in the same disputes; or constitutional court decisions finding treaties to be inconsistent with equal rights clauses due to broad scope for preferential readings of treaties under vague provisions. In light of these developments and in the absence of relevant treaty text, general assurances that investment treaties provide for only equal treatment for covered investors are being met with increasing skepticism, undermining the legitimacy of investment treaties."^[5]

Final Remarks

It is still premature to judge how the amendments to the Supreme Constitutional Court jurisdiction will echo once they are activated. One fears that since these amendments were triggered after the increasing international rulings against the Egyptian state, such would hinder many investors in considering Egypt as one of their investment hubs. Adding to that, it still remains a point of concern how foreign jurisdictions will seek to enforce the rulings should they fail to be enforced within Egypt; will the investor seek enforcement on Egypt-owned assets abroad?

Although we believe national security and constitutional rights are a top priority at all times, and that they remain a valid legal ground for arrangements adopted by any state, it is important that these amendments are applied with caution to avoid creating precedents that could possibly disturb the flourishing economic and investment climate in Egypt.

It is suggested therefore, that Egypt strikes a balance between advantaging the interest of the internal affairs of the state (i.e. national security) on the one hand, and honoring the relevant treaties - investment treaties in specific - which protect and guard the investment-state relationship on the other hand.

[1] Law No. 137 of 2021 amending Law No. 48 of 1979, Published in the Official Gazette No. 32 Bis A, on 15 August 2021.

[2] Translation of the author.

[3] Page 15, Issue 10, the hearings of 27-29 June 2021, the Bulletin of the House of Representatives,

[4] Meaning Investor-State dispute settlement

[5] Para 44, page 16, OECD's 6th Annual Conference on Investment Treaties: The future of investment treaties (virtual conference held on 29 March 2021).

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